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IN THE

Supreme Court of the United States

UNITED STATES POSTAL SERVICE, PETITIONER

v.

FLAMINGO INDUSTRIES (U.S.A.) LTD.
AND ARTHUR WAH

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF THE CENTER FOR THE ADVANCEMENT OF CAPITALISM AS *AMICUS CURIAE* SUPPORTING NEITHER PARTY

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INTEREST OF AMICUS CURIAE[1]

The Center for the Advancement of Capitalism ("CAC") is a District of Columbia corporation organized in 1998, and exempt from income tax under § 501(c)(4) of the Internal Revenue Code. CAC's mission is to present analyses to policymakers, the judiciary, and the public to assist in the identification and protection of the individual rights of the American people. CAC applies Ayn Rand's philosophy of Objectivism to contemporary public policy issues, and provides empirical studies and theoretical commentaries on the impact of legal and regulatory institutions upon the rights of American citizens.

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[1] CAC files this brief with the consent of all parties. The letters granting consent have been filed with the Court. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than CAC or its counsel, make a monetary contribution to the preparation or submission of this brief.

CAC's primary mission is to advance philosophical and legal principles that promote limited government, individual rights, and capitalism. This case directly relates to CAC's mission, and accordingly, this Court's ultimate decision impacts the interests of CAC and its supporters. This case presents the question of whether a government-created monopoly may be sued under the antitrust laws[2] for commercial activities unrelated to that monopoly.

CAC files this brief in support of neither party. While we support affirming the judgment below, we do so for reasons unrelated to the respondents' underlying lawsuit, and on principle, we oppose settling commercial disputes through the use of the antitrust laws.

SUMMARY OF ARGUMENT

The Ninth Circuit held that the Postal Service (the "Service") is a "person"[3] under the antitrust laws because of the "sue-or-be-sued" language contained in 39 U.S.C. § 401(1). The Service argues this is erroneous because "sue-or-be-sued" constitutes only a waiver of sovereign immunity, and since it possessed immunity in the first place, it is a sovereign, not a person. Relying on *United States v. Cooper Corp.*[4], the Service claims that no entity which incorporates the United States' sovereign power can be sued under the antitrust laws.

The Postal Service's position is incorrect because the Service itself is not a properly constituted "sovereign" entity under the Constitution. Despite the definition of the Service as an "independent establishment of the executive branch,"[5] the Service's organization is wholly incompatible with the

[2] Throughout this brief, "antitrust laws" refer primarily to the Sherman Act, 15 U.S.C. § 1, *et seq.* and the Clayton Act, 15 U.S.C. § 12, *et seq.*
[3] "Person" for antitrust purposes is defined in 15 U.S.C. § 7.
[4] 312 U.S. 600 (1941).
[5] 39 U.S.C. § 201.

requirements of Article II for organization of sovereign agencies. Indeed, if the Service were sovereign, this Court would have to strike down portions of the Postal Reorganization Act[6] ("PRA") as unconstitutional under *Morrison v. Olson*[7] and its antecedents. Rather than take this step, the Court should recognize the Service's current structure as that of a non-sovereign government-sponsored corporation that has the same potential to be sued under the antitrust laws as any business corporation.

Moreover, the Postal Service is not entitled to sovereign status because of its substantial non-postal activities; activities that are irrelevant to the Service's constitutional objectives under the Post Office Clause. And despite the Service's argument that antitrust lawsuits would compromise its congressional mandates with respect to the mail, there is no valid public policy reason that warrants reversal of the Ninth Circuit's decision, nor is there reason to infer a broad antitrust exemption for the Service based on existing antitrust policy.

ARGUMENT

I. The Postal Service, as presently structured, does not carry out an essential sovereign function, and is not entitled to be treated as a sovereign entity under the Constitution.

Sovereignty, Chief Justice Jay once wrote, is in the people of the nation.[8] Unlike the feudal principles that underscore traditional European concepts of sovereignty, American sovereignty is rooted in the principles of individual rights and the equality of citizens before the law. The Constitution animates these principles by protecting the individual rights of every citizen through institutions that

[6] Publ. L. 91-375 (39 U.S.C. § 101, *et seq.*) (1970).
[7] 487 U.S. 654 (1988).
[8] *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 471 (1793) (seriatim opinion of Jay, C.J.)

exercise the legislative, executive, and judicial powers. These powers constitute the body of *sovereign rights*, that is, the "unique right possessed by a state or its agencies that enables it to carry out its official functions for the public benefit."[9] These sovereign rights are simply an extension of individual rights, and not a set of powers vested in some higher being or a particular individual. These rights are also "distinguished from certain *proprietary rights* that [the state] may possess like any other private person" (italics added).[10] In this case, the Court must decide whether the Postal Service exercises sovereign or proprietary rights for antitrust enforcement purposes. CAC argues that the Service exercises proprietary rights only when it engages in commerce unrelated to its constitutional duty to provide mail services. Therefore, the Service is entitled to no sovereign classification that would exempt it from the antitrust laws.

a. The Postal Service's organizational structure is incompatible with the Constitution's requirements for a sovereign entity within the executive branch.

The Postal Reorganization Act defines the Postal Service as an "independent establishment of the executive branch." This is not a clear definition. The Service is neither an outright agency nor a traditional corporation. The question is, on which side does the Service fall when determining personhood under the antitrust laws? The Service argues that it is constructed to perform an "essential" sovereign function.[11] But the nature of the Service's organization and governing case law indicate just the opposite.

By its own reading of the PRA, the Postal Service performs an "executive" function.[12] It does not perform legislative or judicial functions, although the Service

[9] BLACK'S LAW DICTIONARY 1401 (7th ed. 1999)
[10] Id.
[11] Pet. 4.
[12] Pet. 4, 8.

possesses limited regulatory powers related to its mail monopoly.[13] Thus, for purposes of this case, the question is limited to whether the Service is an executive agency.

If the Postal Service is correct in stating that it is a "sovereign" entity under the executive branch, then the Service's current legal structure must be held unconstitutional. The problem arises under 39 U.S.C. § 202(c), which requires that the Postmaster General be appointed by the nine governors of the Postal Service. The governors, who are appointed by the President with the advice and consent of the Senate, have the exclusive power to hire and fire the Postmaster General at-will.[14] Although the Postmaster General is the chief executive officer of the Service and enjoys final authority over administrative matters[15], he is ultimately answerable only to the nine appointed governors.[16]

The constitutional problem is that the Postmaster General, as the head of an organization claiming to be a sovereign agency, should be appointed by the President with the advice and consent of the Senate. Under the Appointments Clause of Article II[17], only "inferior" officers of the United States may be hired outside the presidential-nomination-and-Senate-confirmation process. "Superior" officers—including all department heads—must be appointed by the President, and be ultimately be accountable to the President, who is the Nation's chief executive.[18]

[13] *See, e.g.*, 39 U.S.C. § 401(9) (granting the Service eminent domain powers), § 404(7) (authorizing the Service to investigate postal offenses).
[14] *See Carlin v. McKean*, 823 F.2d 620, 623 (D.C. Cir. 1987).
[15] *See, e.g.*, 39 U.S.C. § 203, 39 C.F.R. §§ 3.5, 211.3 & 221.3(b).
[16] *See Carlin*, 823 F.2d at 624.
[17] U.S. CONST. art. II, sec. 2, cl. 2.
[18] U.S. Const. art. II, sec. 1, cl. 1 ("the executive Power shall be vested in a President of the United States of America."); *See also* art. II, sec. 3 (the President "shall Commission all the Officers of the United States").

In the past, the Court held that the line dividing the classification of superior and inferior officers is "far from clear" by simply reading the Appointments Clause.[19] At the same time, the Court has established some basic, non-exclusive criteria for drawing this line. In *Morrison v. Olson*, the Court looked to three factors in determining whether an Independent Counsel appointed by a federal court and subject to dismissal by the Attorney General only "for cause" was a superior officer. The Court ultimately concluded that the Independent Counsel was in fact an inferior officer for three reasons: First, the officer was "subject to removal by a higher Executive Branch official"; second, the law provided only "certain limited duties" for the Independent Counsel, or put another way, the office did not "include any authority to formulate policy for the Government or the Executive Branch"; and finally, the office itself was "limited in jurisdiction."[20] The *Morrison* Court read these factors together in holding that the Independent Counsel was unmistakably an inferior officer under the Appointments Clause.[21]

In this case, the Postmaster General easily falls on the "superior" side of the line under all three of the *Morrison* tests. The Postmaster General's authority under the PRA is extensive, not limited in duties or jurisdiction like the Independent Counsel's. More importantly, the Postmaster General is not subject to removal by any higher Executive Branch official. Neither the President nor any officer under his direction may fire the Postmaster General. That power is vested solely and irreversibly in the nine governors.

It could be argued that the Postmaster General is an inferior officer because he is ultimately accountable to the governors. Under this interpretation, the governors are the "superior" officers within the Postal Service, not the

[19] *Morrison v. Olson*, 487 U.S. at 671.
[20] Id. at 671-673.
[21] Id. at 672.

Postmaster General. But this reasoning lacks credibility. First, the governors are not directly accountable to the President, since governors may be dismissed only "for cause,"[22] thus denying the President the ability to directly influence the hiring or firing of a Postmaster General. Second, the Board of Governors is composed of eleven members—the nine appointed governors, the Postmaster General, and the Deputy Postmaster General.[23] The latter two are discretionary appointments made by the nine governors, and although the Postmaster General cannot vote on matters related to his own hiring and firing, he is nonetheless a member of the body given ultimate power over the Service, thus rendering him a superior officer.

The only other exception to the superior officer requirements of the Appointments Clause is the rule first enunciated by the Court in *Humphrey's Executor v. United States*.[24] In that case, the court held that Congress was permitted to restrict the President's power to remove officers of quasi-legislative and quasi-judicial agencies, such as the Federal Trade Commission, since such agencies are not wholly executive in nature.[25] This exception is inapplicable to the Postal Service, its Board of Governors, and the Postmaster General, since the Service, by its own admission, carries out a purely executive function.

Finally, the PRA itself is vague in defining the Postal Service's legal status. Even Congress hasn't clearly determined what the Service is, as a 1997 report by the legislature's General Accounting Office declared the Service to be a "corporation-like organization."[26] This report found

[22] 39 U.S.C. § 202(a).
[23] 39 U.S.C. § 202(c)-(d).
[24] 295 U.S. 602 (1935).
[25] Id. at 624.
[26] General Accounting Office, U.S. Postal Service: Issues Related to Governance of the Postal Service, GAO Rept. No. 97-141, at 2 (August 1997).

that while the Service steadfastly maintains that it is not a corporation, "it is frequently considered by others to be one and has been previously included in major government corporation studies done over the last several years."[27] The GAO also reported that former and current members of the Board of Governors "believed that the current legal definition of the Postal Service—an independent establishment of the executive branch—is unclear and causes uncertainties about how far the Postal Service can go in competing with the private sector."[28]

These factors demonstrate that the Postal Service cannot be treated as a sovereign entity under the Constitution. The Court must either recognize this fact and hold that the Service is not entitled to claim sovereign status under its present structure, or declare the Service to be a sovereign entity whose structure violates the Appointments Clause.

b. The Postal Service's non-mail functions and activities are not entitled to sovereign status.

Even if the Postal Service's structure were consistent with Article II's requirements for a sovereign entity, many of the Service's current functions and programs do not fall within the scope of Article I's Post Office Clause.[29] The Service does not simply deliver the mail; it also competes with private businesses in numerous markets outside of the Service's First-Class mail monopoly.[30] A well-known

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[27] Id.

[28] Id. at 21.

[29] U.S. CONST. art. I, sec. 8, cl. 7.

[30] The Post Office Clause does not require the government to maintain a coercive mail monopoly. Compare this with the earlier Articles of Confederation (1781), which granted Congress the "sole and exclusive" power to maintain an interstate postal system. Art. IX, cl. 4. It's also noteworthy that the British Crown's re-imposition of a postal monopoly on the American colonies in 1711 led the Virginia House of Burgesses to employ the Revolutionary phrase "no taxation without representation" in response to the monopoly's arbitrary postage rates. *See* GERALD CULLINAN, THE POST OFFICE DEPARTMENT 7-10 (Fredrick A. Praeger 1968).

example is package and express document delivery, where the Service competes with firms like Federal Express and United Parcel Service.

Another example is the Postal Service's recent expansion into online payment products. The Service offers various Internet-based products that enable customers to pay their bills, send money to individuals, and remit payment for online auctions. These product lines did not originate with the Service but rather with private firms. Indeed, these products are partially designed to bypass the Service's First-Class mail monopoly by offering customers a cheaper, more efficient means of making payments. At its core, however, these products are a form of financial services—not postal mail. While the Postal Service is legally permitted to offer online payment products, such products do not fall within the plain meaning of the powers assigned to the Government under the Post Office Clause.[31] The same can be said for the other non-mail product lines maintained by the Service.

It is also the case that the Postal Service's non-mail products distract the Service from providing its essential mail services mission. Often the Service's non-mail activities yield no tangible public benefit while expending Service funds. For example, earlier this year the Postal Service's inspector general reported that nearly $48 million spent by the Service on professional athletic sponsorships—most notably the professional cycling team led by Lance Armstrong—"lacked goals and objectives"[32] and failed to raise any verifiable revenue. The OIG questioned why the

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[31] The Postal Service provides its Internet-based services through its website at www.usps.com. This itself is noteworthy because government entities use Internet domains that end in ".gov", while ".com" domains are reserved for purely commercial usage.

[32] UNITED STATES POSTAL SERVICE, OFFICE OF THE INSPECTOR GENERAL, POSTAL SERVICE'S INVOLVEMENT IN SPONSORSHIPS, Audit Rept. No. OE-AR-03-003, at 4 (2003).

Service would sponsor a cycling team "whose major event is the Tour de France when the primary job of the Postal Service is to deliver mail domestically,"[33] a valid concern given the Service's loss of nearly $1.6 billion in 2001.[34]

While the Postal Service's spending habits are not before this Court, the Service's claim of sovereign status must be viewed in light of its full complement of activities. Recognizing the Service as a sovereign entity would grant the Service—and the Government generally—unlimited authority to engage in commercial competition without being subject to the same rules as private competitors, namely the antitrust laws. This is wholly inconsistent with the American concept of sovereignty, because it is unreasonable to assume that the sovereign—the people—would create an entity that competes against private business interests without having to adhere to the same basic rules as those businesses. Furthermore, it is unreasonable to assume the people would permit such an entity to be substantially removed from the functions (and structure) authorized by the Constitution itself. Consequently, the Court should not create a sovereign refuge for the Postal Service's commercial, non-mail activities.

II. The alleged impact of subjecting the Postal Service to antitrust suits is insufficient to warrant reversal of the decision below.

The Postal Service argues that subjecting it to current and future antitrust litigation "could impose significant expenses and delay on Postal Service operations that would inevitably flow from having to defend against antitrust claims."[35] The Service pleads with the Court to consider "economic uncertainties" and other public policy factors in

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[33] Id. at 15.
[34] Id. ay 14.
[35] Pet. 18.

reviewing the legality of the Ninth Circuit's decision.[36] But while CAC concedes the potential costs of affirming the decision below, this alone does not warrant granting the Service a total judicial exemption from the antitrust laws. The Service's effort to use unrelated policy arguments that do not address the question presented in its petition is a red herring, and should not be given any weight by the Court.

However, an interesting question arises from the Postal Service's public policy argument, i.e. whether the Service's legislative mandate under the PRA should be read as outweighing the concurrent legislative mandate contained in the antitrust laws. CAC takes no position on this issue, as we question the constitutionality of both the existing Postal Service and the antitrust laws, but we note that recent precedent supports the use of antitrust to thwart the congressional objectives of a government agency. Last year the Federal Trade Commission concluded a consent order with the National Academy of Arbitrators ("NAA")[37], an honorary society of labor-management neutrals that maintains a professional ethics code in direct consultation and coordination with the Federal Mediation and Conciliation Service ("FMCS"), an independent agency of the Executive Branch.[38] Despite FMCS' participation in, and active supervision of, NAA's ethics code pursuant to the agency's legislative mandate, the FTC nevertheless asserted jurisdiction to challenge portions of the ethics code under the antitrust laws. NAA settled the case without challenging the FTC's claims, but FTC officials never consulted FMCS about the NAA matter, despite FMCS' longstanding jurisdiction over NAA's affairs.[39]

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[36] Pet. 19.
[37] *In the Matter of National Academy of Arbitrators*, FTC File No. 011-0242 (Final Consent Order Dated Jan. 17, 2003).
[38] 29 U.S.C. § 172, *et seq.*
[39] *See* Comments of Citizens for Voluntary Trade at 3-7, FTC File No. 011-0242 (Dec. 20, 2002) (comments on file with FTC).

While not precedental or conclusive, the NAA case suggests that government antitrust officials see no ordinary conflict between a broad legislative mandate and the broad objectives of antitrust enforcement. CAC does not endorse this expansive view of antitrust policy, but acknowledges contemporary antitrust policy for what it is, especially in light of the Postal Service's argument that subjecting it to antitrust liability would compromise congressional intent:

> In addition, respondents' position [favoring the Ninth Circuit's judgment] would permit courts, rather than Congress, to determine when and whether the Postal Service's operations are anti-competitive, and if so, whether its operations were not sufficiently authorized by Congress such that the Postal Service should be liable for the severe sanctions imposed by the antitrust laws.[40]

This is a reversal of traditional antitrust theory. While it would be nice if every American business could know under what circumstances their actions are "anticompetitive," the reality is that antitrust laws are enforced according to a set of judicially- and executive-created doctrines that define the precise scope of the antitrust laws, which themselves are nothing more than a set of vague policy pronouncements. Antitrust law has never been well-defined by Congress, and the Postal Service is entitled to no greater degree of certainty than the average American business in this respect.

Finally, the Postal Service's central thesis in this case—that the antitrust laws were never meant to be applied to entities like the Service—cannot be accepted as a definitive view of congressional intent, because the Service, as currently structured, did not come into existence until some 80 years following the passage of the first antitrust law, the Sherman Act. Indeed, the antitrust laws precede the concept

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[40] Pet. Reply Brief at 9.

of a hybrid government-corporate entity with the Service's broad commercial scope. Furthermore, there is no evidence in the legislative history of the PRA which demonstrates that Congress considered potential policy conflicts between the PRA and the antitrust laws. It would be reasonable to afford the lower courts an opportunity to develop more substantive case law on this issue before this Court forecloses any future antitrust actions against the Service. And in any case, Congress remains free to grant the Postal Service an express antitrust exemption along the lines the Service seeks in this case. But in the absence of clear statutory language, this Court should not infer an antitrust exemption of any kind for the Service with respect to non-mail services.

CONCLUSION

The Postal Service presents no compelling or persuasive argument for reversing the holding of the Ninth Circuit. Even if the "sue-or-be-sued" language of 39 U.S.C. § 1001 is insufficient to subject the Service to the antitrust laws, the numerous independent grounds discussed above provide an adequate basis to find the Service is a "person" for purposes of the antitrust laws. Therefore the judgment should be affirmed.

Respectfully Submitted,

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